82-6154

No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

October, 1982

NOLLIE LEE MARTIN,

Petitioner,

vs.

STATE OF FLORIDA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA

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QUESTIONS PRESENTED

1. Whether the Fourteenth Amendment permits a trial court to disregard the stong possibility that a defendant's confessions were the product of insanity, solely because the taped record of the confessions reflected "indicia of voluntariness," and the circumstances under which the confessions were given were not coercive enough to have overridden the will and intellect of a sane person?

2. Whether a state trial court's refusal to provide an indigent defendant the assistance of an expert, in circumstances in which a reasonable attorney would engage such services for a client having the independent financial means to pay for them, violates the Sixth and Fourteenth Amendments' guarantees of the assistance of counsel and equal protection?

3. Whether the Florida Supreme Court's cursory recitation of the aggravating and mitigating circumstances found in Petitioner's case, in which the Court failed to addres- or redress substantial Eighth Amendment violations in the assessment of both aggravating and mitigating circumstances, fulfilled the Court's Eight-Amendment based review function to" ["guarantee] that the [aggravating and mitigating] reasons present in one case will reach a similar result to that reached under similar circumstances in another case," Proffitt v. Florida, 428 U.S. 242, 251 (1976)?

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Petitioner prays that a writ of certiorari issue to review the judgment of the Supreme Court of Florida filed September 9, 1982, rehearing having been denied November 4, 1982.

CITATION TO OPINIONS BELOW

The opinion of the Supreme Court of Florida, Case No. 55,716 is reported as Martin v. State, 420 So.2d 583 (Fla. 1982) and is set out at pages 1a-3a in the Appendix hereto. Rehearing was denied by the Supreme Court of Florida, and the order on rehearing is set out at page 4a in the Appendix.

JURISDICTION

The judgment of the Supreme Court of Florida was filed on September 9, 1982, and petitioner's timely motion for rehearing was denied by order dated November 4, 1982. (As noted, the order

denying rehearing is set out at page 4a of the Appendix.) On December 22, 1982, Justice Powell signed an order extending the time for filing the petition for writ of certiorari to and including February 2, 1983. Jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1257 (3), petitioner having asserted below and asserting herein deprivation of rights secured by the Constitution of the United States.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. This case involves the Fifth, Sixth, Eighth and Fourteenth Amendments to the Constitution of the United States.

2. This case further involves Section 921.141, Florida Statutes (1977), entitled: "Sentence of death or life imprisonment for capital felonies; further proceedings to determine sentence." Because of its length, the statute is set out in its entirety at pages 5a-6a of the Appendix.

STATEMENT OF THE CASE

On August 4, 1977, petitioner and another man, Gary Forbes, were indicted for first degree murder, kidnapping, robbery, and sexual battery with respect to an incident which began late in the evening of June 25, 1977 and ended in the early morning hours of June 26, 1977. (R. 4671-4672)[1/] The incident involved the robbery of a convenience food store, during which the clerk, Patricia Greenfield, was taken from the store. Thereafter,

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1/ The letter "R," follwed by specific page numbers, will be used to designate references to the Record on Appeal before the Supreme Court of Florida.

the clerk was "raped" by both Forbes and petitioner (R 3250, 3286), and was then killed by petitioner (R 3260-3263). Apparently, petitioner first attempted unsuccessfully to strangle Ms. Greenfield and then stabbed her in the neck. (Ibid.)

Within approximately six hours of his apprehension on July 4, 1977, petitioner (hereafter referred to as "Mr. Martin" or "petitioner") confessed to the robbery of the convenience store, and to the abduction and homicide of Ms. Greenfield. (R 3497-3515) One week later, on July 11, 1977, Mr. Martin again admitted stabbing Ms. Greenfield. (R. 3410-3515) Prior to trial, counsel for Mr. Martin sought to suppress both of these confessions as involuntarily given and as extracted in violation of Mr. Martin's right to the assistance of counsel (R. 4693-4694). In his motion and in the suppression hearing (R. 519-855; 985-1151), counsel demonstrated that with respect to the July 4 confession, Mr. Martin was subjected to a psychologically coercive interrogation at a time when he was most likely undergoing alcohol withdrawal, and, in the opinion of the only psychiatrist who considered this matter, at a time when Mr. Martin was overtly psychotic and legally insane. With respect to the July 11 confession, counsel demonstrated that Mr. Martin was interrogated immediately after he had been violently subdued (and injured) by a police officer -- in order to prevent Mr. Martin from obtaining a gun and committing suicide -- which was likewise at a time when Mr. Martin was overtly psychotic and legally insane. Despite the proof of these facts, the trial

judge found no violation of the Fourteenth Amendment and held that the confession had been voluntarily and intelligently given. (R. 4756-4760)[2/]

Because the failure to suppress these confessions is one of the questions presented to this Court, a more detailed statement of the facts presented at the suppression hearing is necessary.

With respect to the the July 4 confession, the interrogation of Mr. Martin is an example of psychological coercion as an artform.[3/] Every technique employed by Detective Glover, Detective Anderson, and Assistant State Attorney John Scarola was specifically designed to convince Mr. Martin that it was in his best interests to confess. Initially Detectives Glover and Anderson engaged in a "good guy-bad guy" routine (R. 650, 740-741). Detective Anderson directly confronted Mr. Martin with evidence, real and pretended, that they had against him (R. 696). Anderson told Mr. Martin that Gary Forbes had implicated him in the victim's death (R. 724). Mr. Martin was told that there were

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2 / On appeal to the Supreme Court of Florida, Mr. Martin continued to argue that his confessions should have been suppressed because they were given involuntarily and in violation of his right to the assistance of counsel. (Initial Brief of Appellant, at 6-27; Reply Brief of Appellant, at 1-7; Motion for Rehearing at 8-10.) The Court summarily affirmed the trial court's ruling with the following "analysis":

> "Martin was fully and properly informed as to his rights, which he freely waived in giving the two statements. The presence of the prosecutor in the interrogation room was proper and the taped statement and testimony clearly show that Martin was not misled or promised anything for giving his statement."

Martin v. State, supra, 420 So.2d at 585 (Appendix 3a).

3/Indeed one of the detectives even described the various techniques they employed as "psychological coercion." (R. 741)

three eye witnesses who could identify him (R. 696, 746). He was further told that the reasons an inaccurate BOLO was issued was to keep him and Forbes from leaving town (R. 696). All of these assertions were untrue. In addition to these false-hoods Mr. Martin was shown a picture of the deceased's body and asked how his uncle would feel (R. 610). At one point Anderson in his role as the bad guy, shouted "You scum, scum bag mother fucker, I don't want to talk to you anymore. I hope you fry in the electric chair," and stormed out of the room (R. 693).

To Anderson's bad guy, Detective Glover and later Assistant State Attorney John Scarola played the good guy. Glover and Scarola discussed with Mr. Martin his mental problems. They promised him the court would be told of his desire for psychiatric treatment (R. 658). They continually advised Mr. Martin that the truth could only help and not hurt him (R. 614, 653-656, 746, 783). They also discussed religion with him. Scarola told Mr. Martin the story of Jesus and the two robbers. He told Mr. Martin that God does not give last chances, and it was never too late to seek salvation (R. 780). At the hearing John Scarola testifed that

> "[m]y approach was to minimize the disadvantage that might occur as a result of his giving us a statement and to maximize the advantage to Mr. Martin that might result from him giving a statement."

(R. 806)

Mr. Martin's July 4 confession was the culmation of 5½ hours of pressure-building interrogation. Over that period

of time Mr. Martin was led to believe that the State had overwhelming evidence against him and that his confession was unnecessary for his conviction. He was later told that a representative of the State Attorney's Office could explain the law to him. Indeed John Scarola proceeded to do just that. He told Mr. Martin that Florida did not have a mandatory death penalty. He explained how the bifurcated trial worked, how Mr. Martin's confession could be used against him in the first phase, and how it could help him in the second (R. 783-784).

> "I told him that he needed to consider those advantages, that advantages could be gained by giving us a statement."

(R. 811) That John Scarola actually offered Mr. Martin legal advice is clear from the taped confession itself:

> "I don't want this tape recording to have lies on it because I told you that we want it so we can use it to help you."

(R. 708) And again,

> "Lee, it is only the truth that can help you and that's what we have been trying to explain to you from the beginning."

(R. 711)

Not only were these interrogation techniques coercive: they were used against a person who was particularly vulnerable to coercion. Throughout the July 4 interrogation, Mr. Martin's behavior was bizarre. Even Detective Glover conceded that Mr. Martin's behavior during the interrogation was "abnormal" or "weird" even compared to someone being questioned for first degree murder (R. 649). These unusual signs become more and more pronounced as the interrogation proceeded (R. 647).

Specifically Mr. Martin was observed by Detective Glover to be very emotional; he was continually wringing his hands, shivering, crying, grimacing, shaking, trembling, or abnormally staring; and he was depressed (R. 647-649). Mr. Martin also used words out of context and inappropriately at times (R. 666). John Scarola described Mr. Martin during the giving of the taped statement as under emotional strain, having emotional difficulty and emotionally disturbed (R. 810, 818, 820).

Throughout the July 4th interrogation Mr. Martin's mental problems were discussed. Mr. Martin complained about uncontrollable forces which would come over him. He said that he had not had peace of mind for years, that he would alternate between feelings of depression and euphoria. At times his body would disintegrate and his mind would go into the clouds (R. 665-66).

At the suppression hearing, Mr. Martin testified that during this July 4 interrogation he felt as though his head would explode. He had nausea, his face was burning and he had a throbbing pain in his stomach (R. 995-996). As the interrogation progressed Mr. Martin felt worse and worse. He testified that he was an alcoholic, and he attributed his sickness to being away from alcohol (R 989, 996). He felt so bad that at one point he asked the Detectives if he could go back to his cell and talk the next day (R. 997). According to Mr. Martin he felt that if he gave a confession the police would take him back to his cell where he could lie down (R. 1010-1011).

When John Parr, an expert on alcohol addiction, examined

these facts, Mr. Parr concluded that, in his expert opinion, Mr. Martin was undergoing withdrawal during the interrogation (R. 1068). An untrained observer would know something was wrong with the individual but not that he was withdrawing (R. 1073). According to Mr. Parr one undergoing withdrawal is capable of saying anything (R. 1071-1073).

This striking conclusion was corroborated and taken even further by Dr. Rufus Vaughn, a psychiatrist who examined Mr. Martin within three weeks of the July 4 confession and on six more occasions thereafter. Based upon the same facts presented to Mr. Parr, upon his examination of Mr. Martin, and upon his listening to the tapes of the July 4 confession, Dr. Vaughn concurred that Mr. Martin was undergoing alcohol withdrawal (R. 1116). More significantly, however, Dr. Vaughn also testified that, in his opinion, Mr. Martin was, in addition legally insane at the time he gave his July 4 confession (R. 1102). In Dr. Vaughn's opinion, Mr. Martin suffered from full-blown paranoid schizophrenia, which was so masked over by anti-social behavior that the interrogators would not necessarily have known that Mr. Martin was psychotic (R. 1108-1109, 1117). Mr. Martin's psychosis would have profoundly confused his thought processes during interrogation, to such an extent that he would "not [have] be[en] able to separate out what had happened from what was inside himself." (R. 1111) Respecting his ability to understand and respond to instructions and questions in the interrogation process, the psychosis "would tend to make [his] responses relatively automatic rather than thoughtful or cognitive in the sense of

putting everything together in a totality." (Ibid.) The alcohol withdrawal overlaid on Mr. Martin's psychosis would have magnified these tendencies toward confused, "automatic" thought processes. (R. 1110)

> "The brain of the alcoholic at a time like that [during withdrawal] really operates in an almost automatic kind of fashion and cannot receive and integrate new information and often cannot receive, integrate and act on instructions. They are quite helplessin terms of environment. They are not able to make rational choices.
>
> "The ordinary alcoholic would often give items, history, which has not occurred and cannot be documented by the family."

(R. 1115)

With respect to whether Mr. Martin could have given a confession voluntarily and intelligently under these circumstances, Dr. Vaughn concluded that he could not have. His ability to have understood and responded intelligently to the questions asked him would have been "extremely limited." (R. 1116) He would have had "no capability" to understand and decide whether to answer questions, and "no ability" to understand that he had a right not to make a statement. (R. 1116-1117) Moreover, through a long period of interrogation, if Mr. Martin had not made a statement, that would have been "extremely unusual ... [for] ... [s]chizophrenics will eventually talk to you." (R. 1117) Despite the utter unreliability and involuntariness of the statement thus produced by a combination of psychosis and alcohol withdrawal, however, the statement, taken in isolation, could appear to have been made by a "rational"

individual. Indeed, Mr. Martin's confessions gave such an appearance. As explained by Dr. Vaughn, in response to the trial judge's question whether he had detected in the sound of Mr. Martin's voice on the tape (of his confession) anything that confirmed his diagnosis,

> "[t]he tapes sound very good and convincing in terms as though this is 'factual.' So to answer your question, no, I can't hear anything that is particularly odd or peculiar.
>
> The thing is, however, that in determining paranoid schizophrenics, I have many, many times seen them give the most extraordinary stories with the most extraordinary embellishments and with the most convincing kinds of presentations so that I find it very, very difficult to rely on a single or even two statements such as this with the history that I see and the observations I made of him subsequently.
>
> So a paranoid schizophrenic could be extremely convincing and not appear on the surface to be deviant in their speech or actions."

(R. 1147-1148)

One week after the July 4 confession, to which the foregoing discussion has been directed, Mr. Martin confessed again. Some of the circumstances surrounding the July 4 confession were no longer present when Mr. Martin gave his July 11 confession. Mr. Martin was not subject to psychologically coercive interrogation, nor was he undergoing alcohol withdrawal. However, in the opinion of Dr. Vaughn, he was still insane, and to the same degree as before. (R. 1102) Thus, he was still quite vulnerable to the possibility of confessing to that which he had not done, and he still had very little, if any, capacity to decide not to answer questions directed to him. Despite the

absence of psychologically coercive interrogation and alcohol withdrawal on July 11 -- which together with Mr. Martin's psychosis had produced the confession on July 4 -- new factors emerged on July 11 to produce that day's unreliable, involuntary confession.

The first factor was the reason underlying Mr. Martin's request to speak to Detective Glover again, along with his parole officer, on July 11. His reason was not to make a "rational, voluntary" statement despite the express advice of his counsel to the contrary.[4/] Rather, it was to manipulate a meeting with his parole officer in order "to use her as leverage to get a gun and commit suicide." (R. 637) (Detective Glover's testimony). Thus a suicidal motive, rather than a rational, voluntary desire to make a statement and waive the assistance of counsel, impelled the meeting on July 11 between Mr. Martin, Detective Glover, and Chris Dietert (Mr. Martin's parole officer).

The second factor which combined with Mr. Martin's psychosis on July 11 to produce his second confession was a violent attack upon Mr. Martin by various officers, provoked by his attack upon Ms. Dietert (in order to carry out his plan of suicide) (R. 636). In the attack by the officers, Mr. Martin received a severe cut over the eye (R. 638). His statement, made immediately thereafter, was given while he was confined (for security reasons) under a stairwell (R. 636) and while he

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4/ Between July 4 and July 11, 1977, Mr. Martin had been formally charged in a non-adversary probable cause hearing, prior to which counsel had been appointed. (R. 1-30) Thus, Mr. Martin's Sixth and Fourteenth Amendment right to the assistance of counsel was also implicated in connection with this confession.

was bleeding (R. 639, 733). While taking Mr. Martin's statement, Detective Glover testified that Mr. Martin had "a wild and yet at the same time frustrated type of look," (R. 640), that he was "shaking," (R. 641), and that he was "in a very emotional state," such that Detective Glover thought that he might "cry ... a couple of times during the statement ..." (Ibid.) According to Detective Glover, these actions were similar to Mr. Martin's actions in the July 4 interrogation (R. 642-643). Only after Mr. Martin gave his statement was he taken to the hospital for treatment of his head injury (R. 1016).

Thus, as on July 4, the statement given by Mr. Martin on July 11 was also the product of his psychotic thought processes, activiated by suicidal ideation and the fear engendered by the violent assault upon him.

Despite all of the foregoing evidence, uncontradicted factually or through expert opinion evidence by the state in the suppression hearing,[5] the trial court found that both confessions were voluntarily and intelligently given and that Mr. Martin had validly waived his Fifth, Sixth, and Fourteenth Amendment rights not to be compelled to incriminate himself and to have the assistance of counsel at a critical stage of the proceedings.

Thereafter at trial, the only issue in dispute between Mr. Martin and the State was whether Mr. Martin was insane at

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5 /The state produced no psychiatrist, or anyone else, to dispute the opinions by Dr. Vaughn that Mr. Martin was insane at the time of both confessions and by Dr. Vaughn and Mr. Parr that Mr. Martin was undergoing alcohol withdrawal as well at the time of the July 4 confession.

the time of the offense. The only defense expert presented in support of this issue was Dr. Vaughn. Dr. Vaughn testified, as he had at the suppression hearing, that Mr. Martin suffered from paranoid shizophrenia (R. 3655). This condition, in Dr. Vaughn's opinion, caused Mr. Martin to be insane at the time of the offense (R. 3654).

The state presented three witnesses in rebuttal. Dr. Antonio Fueyo and Dr. Lionel Blackman, both psychiatrists, concluded that Mr. Martin knew right from wrong at the time of the offense (R 3755, 3845). Each diagnosed him as a sociopath or psychopath (R 3766-2767, 3850). Each also believed that Mr. Martin was "faking" symptoms of psychosis in order to impress upon the doctors that he was quite ill -- when, in their opinions, he was not. (R. 3756-3760; 3895) The state's third witness Dr. Isidor Scherer had no opinion as to Mr. Martin's sanity at the time of the offense (R. 3912). However, on the basis of the psychological tests which he administered to Mr. Martin, Dr. Scherer concluded that Mr. Martin's test results indicated either that he was faking or that he suffered from extreme psychosis (R. 3912, 3935). Dr. Scherer believed that Mr. Martin was feigning the psychotic symptoms (R. 3935).

Thus, the sole issue in dispute boiled down to whether Mr. Martin was extremely psychotic or was feigning psychosis in order to dvelop a defense. Counsel for Mr. Martin recognized this critical issue prior to trial (R. 4590-4593) and moved for the appointment of an additional expert, Dr. Theodore Blau (R. 4749-4750). Dr. Blau was a clinical psychologist whose

special expertise in psychological testing led him to the preliminary opinion that the psychological tests administered by Dr. Scherer were improperly administered and improperly evaluated (R. 4591; 4749). In moving for the appointment of Dr. Blau, counsel for Mr. Martin stated explicitly that "if the Defendant were not indigent, he would retain the services of Dr. Theodore H. Blau to examine him and to render an opinion as to his sanity at the time of the offense," (R. 4749), and that "because there had been the allegation that my client was faking his insanity, ... this direct contradictory evidence of Dr. Blau was important and crucial to the defense." (R. 4592-4593) The trial court denied Mr. Martin's motion prior to trial, because in the court's opinion there had been sufficient evaluation of Mr. Martin (R. 1194-1195), and denied his post-trial motion for a new trial on this ground for the same reason (R. 4594-4595).[6/] Mr. Martin raised this issue on appeal as a denial of due process and equal protection (Initial Brief of Appellant, at 27-33; Reply Brief of Appellant, at 7-10), and the Florida Supreme Court denied relief without any discussion of the issue.

6/ A total of seven persons had evaluated Mr. Martin prior to the making of this motion. Three (two psychiatrists and a psychologist) had been retained by defense counsel without court appointment. Three (two psychiatrists and a psychologist) had been appointed on the State's motion. The seventh, a neurologist, had been appointed on Mr. Martin's motion. The neurologist found no evidence of neurological impairment; the three defense experts all found that Mr. Martin was paranoid schizophrenic, with Dr. Vaughn concluding that as a result Mr. Martin was competent to stand trial (R. 3727-3732) but insane at the time of the offense and at the time of both confessions (R. 3655, 1102), with Dr. Barnard concluding that as a result Mr. Martin was incompetent to stand trial (R. 178; but being unable to render an opinion as to sanity at the time of the offense, and with Dr. Levin reaching no stated conclusions as to competency or sanity; and finally, the three court-appointed (on the state's motion) experts all found that Mr. Martin was not psychotic, was feigning psychotic symptoms, and was a sociopath.

Following Mr. Martin's conviction, the penalty phase of his trial focused again on his mental condition at the time of the offense. Dr. George Barnard, a psychiatrist, testified for the defense that in his opinion at the time of the homicide, Mr. Martin was under the influence of extreme mental or emotional disturbance, was acting under extreme duress, and had his capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of law substantially impaired (R. 4299). Dr. Vaughn was recalled and he reached the same conclusion (R. 4376-4377) even if hypothetically Mr. Martin was not, as he believed him to be, psychotic (R. 4379). Dr. Hans Zeisel, professor emeritus of law from the University of Chicago, testified and produced extensive evidence that the death penalty is not a deterrent to murder (R. 4322-4369). However, when defense counsel sought to have Dr. Zeisel relate deterrence to a case, such as Mr. Martin's in which mental illness may be a factor, the prosecutor's objection was sustained (R. 4340-4345).

Following rebuttal by the State, instructions to the jury, and almost four hours of deliberations, the jury returned an advisory verdict of death (R. 4500, 4504, 4506). The trial judge imposed the death sentence in accord with this recommendation and entered findings in support of the death sentence (R. 4831-4841).

REASONS FOR GRANTING THE WRIT

I.

THE FOURTEENTH AMENDMENT CANNOT PERMIT A TRIAL COURT TO DISREGARD THE STRONG POSSIBILITY THAT A DEFENDANT'S CONFESSIONS WERE THE PRODUCT OF INSANITY SOLELY BECAUSE THE TAPED RECORD OF THE CONFESSIONS REFLECTED "INDICIA OF VOLUNTARINESS," AND THE CIRCUMSTANCES UNDER WHICH THE CONFESSIONS WERE GIVEN WERE NOT COERCIVE ENOUGH TO OVERRIDE THE WILL AND INTELLECT OF A SANE PERSON.

The trial court's refusal to suppress Mr. Martin's confessions raises an important question concerning the proper evaluation of the voluntariness and rationality of a confession by a defendant who was, in all probability, insane at the time of his confessions. The Court has previously considered this question in Blackburn v. Alabama, 361 U.S. 199 (1960). In Blackburn, "the evidence indisputably establishe[d] the strongest probability that Blackburn was insane and incompetent at the time he allegedly confessed." 361 U.S. at 207. When this central fact was coupled with the remaining circumstances surrounding the confession -- all of which provided opportunities for the coercion of a confession, 351 U.S. at 207-208 -- the Court held that the use of the confession violated due process, for "the evidence here clearly establishes that the confession most probably was not the product of any meaningful act of volition." 361 U.S. at 211.

While Blackburn thus pronounced a confession involuntary and unintelligent when "the evidence indisputably establishe[d] the strongest possibility that [the defendant] was insane and incompetent" at the time of the confession, it did not articulate a clear standard for evaluating the constitutionalty of a confession which may have been the product of insanity but which was not as clearly the product of insanity as the confession

in Blackburn. This case raises this important and troublesome issue.

In this case, it can clearly be said that the trial judge's resolution of this issue is not consistent with the Due Process Clause, whatever a proper resolution should be.

As discussed at length in the Statement of the Case, the evidence before the trial judge on Mr. Martin's motion to suppress showed, without contradiction and with respect to both confessions, (1) that Mr. Martin was overtly psychotic, unable to answer questions reflectively, at the time he confessed; (2) that he was subject to additional physiological or emotional influences (alchohol withdrawal on July 4 and suicidal ideation on July 11) at the times he confessed which tended to diminish his already-weakened capacity for rational, voluntary behavior; and (3) that he was subject to treatment by the authorities at the times he confessed which could readily have coerced him into making the confessions.

While this evidence was remarkably similar to the evidence before the judge in Blackburn, the evidence of psychosis here must have been in dispute in the trial judge's mind even though it was not in dispute in the evidence adduced at the suppression hearing. During the two days preceding the suppression hearing, the judge had presided over Mr. Martin's competency hearing. (R. 158-433) In that hearing, even though the judge heard Dr. Barnard give a second opinion that Mr. Martin was psychotic,[7/] the judge also heard Dr. Scherer, Dr. Fueyo and Dr. Blackman testify that Mr. Martin was not psychotic but that

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7/The Court will recall that Dr. Vaughn was to testify similarly in the suppression hearing (R. 1102).

he was trying to make himself appear to be psychotic. (R. 249-319; 331-371; 375-425). Thus, despite the formal record on the motion to suppress, the evidence of psychosis was not as indisputable in the judge's mind in this case as it apparently was in Blackburn.

Nonetheless, Mr. Martin did present a probability that his confession was the product of insanity. Yet the trial judge completely ignored this evidence. He did so by finding "indicia of voluntariness" in the tape recordings of Mr. Martin's confessions. (R. 4757, 4760) With this finding, he apparently found that Mr. Martin was not insane -- though he did not say so -- and proceeded to determine that the coercion inherent in the circumstances attendant to both confessions was insufficient to make them involuntary or unintelligent. (R. 4759, 4760)

The trouble with the judge's approach is that he could not find that Mr. Martin was sane, as he did,solely on the basis of the "indicia of voluntariness." As Dr. Vaughn explained at the suppression hearing, Mr. Martin could be absolutely psychotic and sound as if he were absolutely in control of all his faculties. (R. 1147-1148). This Court recognized that precisely the same facts in Blackburn could not support any inference of voluntariness or rationality.

Accordingly, there is no factual support for the trial judge's finging upon which he apparently determined that Mr. Martin's confession was not the product of insanity. While the trial judge thus improperly ignored the probability that Mr. Martin was insane at the time of his confessions, it is now

impossible to say what a proper resolution of this issue would have been had the judge evaluated, and not avoided, the evidence. At the very least, Mr. Martin's conviction should be reversed for the trial judge's failure to evaluate properly the probability that insanity compelled his confession. At the same time, the Court should articulate principles in this area that require probabilities of insanity-produced confessions, such as those raised by Mr. Martin's case, to be evaluated directly and fairly by the trial courts.

II.

A STATE TRIAL COURT'S REFUSAL TO PROVIDE AN INDIGENT DEFENDANT THE ASSISTANCE OF AN EXPERT, IN CIRCUMSTANCES IN WHICH A REASONABLE ATTORNEY WOULD ENGAGE SUCH SERVICES FOR A CLIENT HAVING THE INDEPENDENT FINANCIAL MEANS TO PAY FOR THEM, VIOLATES THE SIXTH AND FOURTEENTH AMENDMENT GUARANTEES OF THE ASSISTANCE OF COUNSEL AND EQUAL PROTECTION.

The question raised here is concerned with whether, in relation to the use of expert assistance by a criminal defendant, the constitution can tolerate discrimination between indigent defendants and defendants who possess the means to protect their rights. In other contexts, this Court has consistently held that the constitution cannot tolerate such discrimination. See, e.g. Griffin v. Illinois, 351 U.S. 12 (1956) (right to trial transcript); Gideon v. Wainwright, 372 U.S. 335 (1963) (right to counsel in state trial courts); Douglas v. California, 372 U.S. 353 (1963) (right to counsel on appeal); Roberts v. LaVallee, 389 U.S. 40 (1967) (right to transcript of preliminary hearing); Argersinger v. Hamlin, 407 U.S. 25 (1972) (right to counsel for misdemeanors); Bounds v. Smith, 430 U.S. 817 (1977) (right of prisoners to access to law libraries or

professional assistance in habeas proceedings). While the answer to the question posed should, therefore, be "no," the Court has not before considered the question. Mr. Martin submits that his case not only begs for an answer to this question, but also presents the question in a context in which the Court can provide much-needed guidance to other courts.

As described in detail in the Statement of the Case, Mr. Martin was the beneficiary of some court-provided expert assistance. However, the provision of defense experts still left him one witness short on the critical issue of his trial: whether he was psychotic or a self-serving fabricator of psychotic symptomatology. In the context of the evidence, the evidence adduced by the State's experts tended to be weightier and thus weighed toward a finding of fabrication. However, counsel for Mr. Martin had located a new expert witness who could, at the very least, have counter-balanced the evidence by demonstrating that the factual basis for one of the state's expert's opinions was erroneous. Counsel averred that the witness was crucial to his client's defense (R. 4592-4593), and on the basis of an objective assessment, he was correct, since the credibility of Mr. Martin's illness -- and his only defense -- hung in the balance. Moreover, counsel averred that he would retain this new expert if his client were not indigent (R. 4749).

These circumstances thus cry out for the articulation of principles guiding the provision of expert defense witnesses for indigent criminal defendants. Mr. Martin's case does not present the question as to whether such witnesses must be

provided. He was provided defense experts, and the constitutional necessity of providing some experts to indigent criminal defendants is so clear that this Court need not provide the answer. However, the difficult recurring question is precisely the question presented by Mr. Martin's case: to what extent must expert assistance be provided indigent criminal defendants?

The only analysis of this issue to date has been in connection with federal criminal proceedings. In such proceedings, 18 U.S.C. §3006A (e)(1) authorizes the provision of "expert... services necessary to an adequate defense" upon a showing "that the services are necessary." The uniform interpretation of this statute by the Courts of Appeals is that the showing "that the services are necessary" is sufficiently made

> "... when the defense attorney makes a timely request in circumstances in which a reasonable attorney would engage such services for a client having the independent financial means to pay for them."

United States v. Bass, 477 F.2d 723, 725 (9th Cir. 1973). See also, Williams v. Martin, 618 F.2d 1021, 1025-1026 (4th Cir. 1980); United States v. Durant, 545 F.2d 823, 826-827 (2d Cir. 1976); Brinkley v. United States, 498 F.2d 505, 507-510 (8th Cir. 1974); United States v. Chavis, 476 F.2d 1137, 1143 (D.C. Cir. 1973); United States v. Tate, 419 F.2d 131 (6th Cir. 1969).

Under the federal rule, Mr. Martin would have been provided the expert requested. Since that statutory rule was enacted "to implement the sixth amendment guarantee of the assistance of counsel," Proffitt v. United States, 582 F.2d 854

857 (4th Cir. 1978) [citing 110 Cong. Rec. 445, 18521 (1964); 109 Cong. Rec. 14224 (1963)], the same standard should be articulated for and applied to state criminal proceedings. Mr. Martin's case provides a tailor-made opportunity for the Court to do just that.

III.

THE FLORIDA SUPREME COURT'S CURSORY RECITATION OF THE AGGRAVATING AND MITIGATING CIRCUMSTANCES IN PETITIONER'S CASE CONTRAVENED THE COURT'S DUTY TO "[GUARANTEE] THAT THE [AGGRAVATING AND MITIGATING] REASONS PRESENT IN ONE CASE WILL REACH A SIMILAR RESULT TO THAT REACHED UNDER SIMILAR CIRCUMSTANCES IN ANOTHER CASE," PROFFITT V. FLORIDA, 428 U.S. 242, 251 (1976).

The manner of review by the Florida Supreme Court in the instant case did not meet the constitutional requirements for appellate review enunciated in Proffitt v. Florida, 428 U.S. 242 (1976). In upholding the constitutionality of Florida's capital sentencing scheme, this Court relied upon the Florida Supreme Court's "[guarantee] that the [aggravating and mitigating] reasons present in one case will reach a similar result to that reached under similar circumstances in another case." Id. at 251. The appeal procedure was thus seen as an integral part of the task of a capital sentencing scheme: to remove arbitrariness from the imposition of the death sentence. In this Court's view, review by the Florida Supreme Court served as a final check against the arbitrary imposition of death sentences, for it was a system "under which the evidence of the aggravating and mitigating circumstances is reviewed and reweighed by the Supreme Court of Florida 'to determine independently

whether the imposition of the ultimate penalty is warranted.'" Id. at 253.

This Court believed that the Florida Supreme Court would undertake "responsibly to perform its function of death sentence review with a maximum of rationality and consistency." Id. at 258. And that each case would be "conscientiously reviewed... to assure consistency, fairness, and rationality in the evenhanded operation of state law." Id. at 259-60. Upon this basis, Florida's form of review was thus deemed to be equivalent to the "specific form of review" provided by the Georgia statute and, accordingly, was of crucial importance to the constitutionality of Florida's capital sentencing scheme. Absent this independent, conscientious, and reliable method of review, the Florida capital sentencing statute would be subject to the arbitrariness and capriciousness condemned in Furman v. Georgia, 408 U.S. 238 (1972).

The Florida Supreme Court's opinion in the present case does not meet the assurances relied upon by the Court in Proffitt. In its singular lack of any analysis, despite serious constitutional questions, the Florida Supreme Court's opinion fails to meet the court's constitutional responsibility. Instead the court's opinion suggests that it engaged in precisely the "cursory or rubber stamp review" that this Court trusted would not occur. Id. at 259.

In Mr. Martin's case, the Florida Supreme Court's "review" of the aggravating and mitigating circumstances consisted entirely of the following:

"The jury recommended the death sentence. The judge found five aggravating circumstances, all of which are supported by the record, and presented his reasons therefor. [Footnote setting forth judge's findings omitted.] Although there was extensive conflicting expert testimony on Martin's mental condition, the court carefully considered this and concluded that the mental mitigating circumstances did not apply."

Martin v. State, supra, 420 So.2d at 585 (Appendix 3a). Never given any analysis in this review were the following substantial errors in the assessment of aggravating and mitigating circumstances:

(a) In its instructions to the jury and in its findings, the trial court failed to instruct the jury to give less weight, and failed itself to give less weight, to the "heinous, atrocious or cruel" aggravating circumstance [Fla. Stat. §921.141 (5)(h)] in light of the heinousness of the crime being a product of mental illness, as required by Huckaby v. State, 343 So.2d 29, 33-34 (Fla.1977). Because of the failure to limit the weight of this circumstance as required, petitioner's sentence may have been imposed under a standard inconsistently applied, and harshly, to him. See Godfrey v. Georgia, 446 U.S. 420 (1980).

(b) The aggravating circumstances set forth at Fla. Stat. § 921.141 (5) (a) and (b) [murder committed by person under sentence of imprisonment; previously convicted of felony involving use of violence] were duplicated in Mr. Martin's case, for the judge found both circumstances on the basis of the same fact: the prior conviction of a violent felony. By this error, the aggravating circumstances in Mr. Martin's case appeared weightier than the facts allowed, thus opening the door to the unguided exercise of sentencing discretion.

(c) In direct violation of the principles articulated in Godfrey v. Georgia, supra, the finding of the aggravating circumstance set forth at Fla. Stat. §921.141(5)(e) [homicide committed to avoid arrest] extends the limits of the application of this circumstance -- established in Riley v. State, 366 So.2d 19 (Fla. 1979) and Menendez v. State, 368 So.2d 1278 (Fla. 1979) -- beyond the point at which the circumstance can be said, on a principled basis, to be present in some

cases and absent in others.

(d) In direct violation of Furman v. Georgia, 408 U.S. 238 (1972) and its progeny, the Court permitted the introduction of evidence of non-statutory aggravating circumstances: petitioner's prior indictment (but not conviction) for premeditated murder and an allegation that petitioner previously had attempted to commit a premeditated murder.

(e) The trial court failed as a matter of law to consider petitioner's mental condition in mitigation of punishment, either because petitioner failed to establish that he was legally insane or because petitioner failed to prove that his mental condition met the statutory mitigating circumstances. See Eddings v. Oklahoma, 455 U.S. 104 (1982).

(f) The trial court excluded mitigating evidence pertaining to the character of petitioner when it excluded testimony concerning the lack of any deterrent effect of the death penalty on persons, such as petitioner, whose crimes were produced by mental illness. See Lockett v. Ohio, 438 U.S. 586, 603-605 (1978) (plurality opinion).

Mr. Martin's case thus presents precisely the same issue currently before the Court in Barclay v. Florida (No. 81-6908): whether the Florida Supreme Court's affirmance of a death sentence without setting aside, and considering the impact of, erroneously found aggravating circumstances and erroneous determinations that there are no mitigating circumstances, can be sustained under the Eighth Amendment. At the very least, therefore, Mr. Martin's petition should be held in abeyance pending the decision in Barclay. See, e.g. Davis v. Georgia, Spraggins v. Georgia, Collins v. Georgia, Baker v. Georgia, Hamilton v. Georgia, Brooks v. Georgia, 446 U.S. 961 (1980) [cases held pending the decision in Godfrey v. Georgia, supra].

CONCLUSION

For the reasons expressed herein, the Petitioner, Nollie Lee Martin, respectfully requests that this Court grant his petition for a writ of certiorari.

Respectfully submitted,

RICHARD L. JORANDBY
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15th Judicial Circuit of Florida
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West Palm Beach, Florida 33401
(305) 837-2150

BY Richard H. Burr, III
RICHARD H. BURR, III
Assistant Public Defender

Counsel for Petitioner.

NO. _____

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1982

==========

NOLLIE LEE MARTIN,

Petitioner,

vs.

STATE OF FLORIDA,

Respondent.

==========

APPENDIX TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA

RICHARD L. JORANDBY
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CRAIG S. BARNARD
Chief Assistant Public Defender

RICHARD H. BURR, III
Assistant Public Defender

Counsel for Petitioner

INDEX TO APPENDIX

Jr., J., of murder in the first degree and was sentenced to death, and he appealed. The Supreme Court held that: (1) the trial court properly excluded three death-scrupled jurors; (2) the trial court did not err by excluding instruction as to the penalty for first-degree murder; and (3) the evidence was sufficient to sustain the imposition of the death penalty.

Affirmed.

1. Jury ⇐108

In prosecution for murder, trial court properly excluded three jurors who would not impose the death sentence under any circumstances.

2. Homicide ⇐311

In prosecution for murder, trial court properly instructed the jury and did not err by excluding instruction as to the penalty for first-degree murder.

3. Homicide ⇐354

Evidence sustained imposition of death penalty on defendant who was convicted of murder in the first degree despite extensive conflicting expert testimony on defendant's mental condition. West's F.S.A. § 921.-141(6)(b, f).

Richard L. Jorandby, Public Defender, and Jerry L. Schwarz and Jon May, Asst. Public Defenders, Fifteenth Judicial Circuit, West Palm Beach, for appellant.

Jim Smith, Atty. Gen., and Robert L. Bogen, Asst. Atty. Gen., West Palm Beach, for appellee.

PER CURIAM.

Nollie Lee Martin was convicted of murder in the first degree of Patricia Greenfield. The jury recommended that the death sentence be imposed, and, after weighing the aggravating and mitigating circumstances, the trial court imposed a sentence of death. Martin's conviction and sentence are before this Court on direct appeal pursuant to article V, section 3(b)(1), Florida Constitution. We have reviewed

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Nollie Lee MARTIN, Appellant,

v.

STATE of Florida, Appellee.

No. 55716.

Supreme Court of Florida.

Sept. 9, 1982.

Rehearing Denied Nov. 4, 1982.

Defendant was convicted in the Circuit Court, Palm Beach County, Marvin Mounts,

the record and considered the ten points on appeal and affirm the conviction and sentence.

Patricia Greenfield was an employee of a Cumberland Farm Food Store in Delray Beach. On June 25, 1977 two men entered the store, robbed it, and abducted Ms. Greenfield. Her body was discovered a few days later on a garbage dump. Investigation led to the arrest of Martin and Gary Forbes for the robbery and murder.

The trial judge correctly summarized additional facts as follows:

> Gary Forbes is an 18-year old high school dropout, recently married, with no criminal record and several juvenile referrals. He was employed at his father's service station with Nollie Lee Martin who had just been paroled from the State of North Carolina several months earlier (after serving almost five years of a sentence of eighteen years to thirty years) for the second degree arson slaying of three (3) human beings.
>
> Gary Forbes tendered a plea of guilty to the Court which was supported by the concurrence of the family of the victim, the police agency involved and the State Attorney's Office. The Court accepted that plea and the defendant Forbes has now been sentenced pursuant to his plea bargain. That matter is covered in a separate order.
>
> The victim was a college student who was temporarily employed in a convenience store. The two men robbed her at knife point of approximately ninety (90) dollars and two cases of beer shortly before closing. They drove her back to Martin's apartment and blindfolded her along the way with Martin's shirt. The sworn testimony and confessions indicate that each man committed forcible sexual battery on the victim at the apartment.
>
> The victim was transported away from the apartment, still blindfolded and under the assurances that she would be released at a remote area. After driving some distance in a rather aimless fashion, the automobile arrived at the vicinity of the Lantana Dump and the defendant, Nollie Lee Martin, walked the victim away from the view of Forbes. According to Forbes, the defendant, Martin, stated that he attempted to strangle or suffocate the victim with the use of a short piece of rope but that she recovered her breath each time that he thought she had succumbed. He then stabbed her several times in the throat. The autopsy revealed that she died of these stab wounds and suggests at least an inference that there was some struggle before the death strokes were administered.

Martin confessed to the killing on July 4 and again on July 11. His defense at trial was insanity. At the sentencing hearing he sought the benefit of the mental mitigating factors of being under the influence of extreme mental and emotional disturbance and that his capacity to appreciate the criminality of his conduct and to conform his conduct to the requirements of law was substantially impaired.[1] He had numerous psychiatric examinations, and conflicting opinions ensued from the doctors examining him. One considered him insane at the time of the murder, but three opined otherwise.[2] At sentencing two felt that he met the statutory mental mitigating circumstances. The reconciliation of these conflicts was the responsibility of the jury and, to the extent it concerned his sentencing responsibilities, the trial judge. When there is competent substantial evidence to support the conclusion reached, their determination is final. *Tibbs v. State*, 397 So.2d 1120 (Fla.1981); *Clark v. State*, 379 So.2d 97 (Fla.1979), *cert. denied*, 450 U.S. 936, 101 S.Ct. 1402, 67 L.Ed.2d 371 (1981); *McNeil v. State*, 104 Fla. 360, 139 So. 791 (1932).

On appeal Martin raises ten issues for our consideration. Four deal with his in-custody statements, one challenges the exclusion of three jurors because they would not impose the death sentence under any circumstance, one challenges the exclusion of cer-

1. § 921.141(6)(b) & (f), Fla.Stat. (1977).

2. There had been a pretrial determination that Martin was competent to stand trial.

tain jail records, three deal with allegedly improper jury instructions, and one challenges the imposition of the death sentence. After reviewing the record, we find no merit in any of the points raised and do not find that any issue warrants or requires specific discussion. We have independently searched the record for error and have found none.

[1, 2] Martin was fully and properly informed as to his rights, which he freely waived in giving the two statements. The presence of the prosecutor in the interrogation room was proper, and the taped statement and testimony clearly show that Martin was not misled or promised anything for giving his statement. The court properly excluded the three death-scrupled jurors. *Downs v. State*, 386 So.2d 788 (Fla.1980). We also find no abuse by the trial court in excluding the jail records. The court properly instructed the jury and did not err by excluding the instruction as to the penalty for first-degree murder. *Welty v. State*, 402 So.2d 1159 (Fla.1981).

By supplemental authority Martin claims relief because of the United States Supreme Court decision in *Payton v. New York*, 445 U.S. 573, 100 S.Ct. 1371, 63 L.Ed.2d 639 (1980). Martin was not arrested in his own home, but in the home of a third party who gave his consent to police entry. *Payton* does not apply to Martin's situation.

[3] The jury recommended the death sentence. The judge found five aggravating circumstances, all of which are supported by the record, and presented his reasons therefor.[3] Although there was extensive conflicting expert testimony on Martin's mental condition, the court carefully considered this and concluded that the mental mitigating circumstances did not apply.

This was a well-tried case. It is evident that counsel were well prepared and zealously advocated their positions. The trial judge was deliberate and careful to afford a fair trial to all. The verdict of the jury and the findings of the trial judge are amply supported by the record. The judgment and sentence are affirmed.

It is so ordered.

ALDERMAN, C.J., and ADKINS, BOYD, OVERTON, SUNDBERG, McDONALD and EHRLICH, JJ., concur.

3. The trial judge found that:

(a) The capital felony was committed while the defendant was under sentence of imprisonment, on parole status. On the 18th day of January, 1973, a consolidated Judgment and Commitment was entered in the General Court of Justice, Superior Court Division of the State of North Carolina. It recited that the defendant had appeared for trial upon three charges of Murder and that he had entered a plea of guilty to Murder in the Second Degree in three cases. His sentence was not less than eighteen (18) years nor more than thirty (30) years in the custody of the State Department of Corrections.

(b) The defendant was previously convicted of felonies involving the use or threat of violence to the person. See (a) above.

(d) The capital felony was committed while the defendant was engaged in flight after committing a robbery and rape (sexual battery); it was also committed while the defendant was engaged in the felony of kidnapping.

(e) The capital felony was committed for the purpose of avoiding or preventing a lawful arrest inasmuch as the defendant was destroying the chief witness in the person of his victim.

(h) The capital felony was especially heinous, atrocious or cruel.

Supreme Court of Florida

THURSDAY, NOVEMBER 4, 1982

NOLLIE LEE MARTIN, Appellant,	*	CASE NO. 55,716
v.	*	Circuit Court No. 77-1675 CF "S" (Palm Beach)
STATE OF FLORIDA, Appellee.	*	

Upon consideration of the Motion for Rehearing filed in the above cause by attorney for appellant, and response thereto,

IT IS ORDERED that said Motion be and the same is hereby denied, and it is further

ORDERED that Appellant's Application for Stay of Judgment and Mandate is granted and proceedings in this Court and in the Circuit Court of the Fifteenth Judicial Circuit, in and for Palm Beach County, Florida are hereby stayed to and including December 6, 1982, to allow appellant to seek review in the Supreme Court of the United States and obtain any further stay from that court.

A True Copy

TEST:

Sid J. White
Clerk, Supreme Court

By: Tanya Carroll
Deputy Clerk

TC
cc: Hon. John B. Dunkle, Clerk
Hon. Marvin U. Mounts, Jr., Judge

Craig S. Barnard, Esquire
Richard B. Greene, Esquire
Robert L. Bogen, Esquire

CHAPTER 921

SENTENCE

921.141 Sentence of death or life imprisonment for capital felonies; further proceedings to determine sentence.—

(1) SEPARATE PROCEEDINGS ON ISSUE OF PENALTY.—Upon conviction or adjudication of guilt of a defendant of a capital felony, the court shall conduct a separate sentencing proceeding to determine whether the defendant should be sentenced to death or life imprisonment as authorized by s. 775.082. The proceeding shall be conducted by the trial judge before the trial jury as soon as practicable. If, through impossibility or inability, the trial jury is unable to reconvene for a hearing on the issue of penalty, having determined the guilt of the accused, the trial judge may summon a special juror or jurors as provided in chapter 913 to determine the issue of the imposition of the penalty. If the trial jury has been waived, or if the defendant pleaded guilty, the sentencing proceeding shall be conducted before a jury impaneled for that purpose, unless waived by the defendant. In the proceeding, evidence may be presented as to any matter that the court deems relevant to the nature of the crime and the character of the defendant and shall include matters relating to any of the aggravating or mitigating circumstances enumerated in subsections (5) and (6). Any such evidence which the court deems to have probative value may be received, regardless of its admissibility under the exclusionary rules of evidence, provided the defendant is accorded a fair opportunity to rebut any hearsay statements. However, this subsection shall not be construed to authorize the introduction of any evidence secured in violation of the Constitution of the United States or the Constitution of the State of Florida. The state and the defendant or his counsel shall be permitted to present argument for or against sentence of death.

(2) ADVISORY SENTENCE BY THE JURY.—After hearing all the evidence, the jury shall deliberate and render an advisory sentence to the court, based upon the following matters:

(a) Whether sufficient aggravating circumstances exist as enumerated in subsection (5);

(b) Whether sufficient mitigating circumstances exist which outweigh the aggravating circumstances found to exist; and

(c) Based on these considerations, whether the defendant should be sentenced to life imprisonment or death.

(3) FINDINGS IN SUPPORT OF SENTENCE OF DEATH.—Notwithstanding the recommendation of a majority of the jury, the court, after weighing the aggravating and mitigating circumstances, shall enter a sentence of life imprisonment or death, but if the court imposes a sentence of death, it shall set forth in writing its findings upon which the sentence of death is based as to the facts:

(a) That sufficient aggravating circumstances exist as enumerated in subsection (5), and

(b) That there are insufficient mitigating circumstances to outweigh the aggravating circumstances.

In each case in which the court imposes the death sentence, the determination of the court shall be supported by specific written findings of fact based upon

the circumstances in subsections (5) and (6) and upon the records of the trial and the sentencing proceedings. If the court does not make the findings requiring the death sentence, the court shall impose sentence of life imprisonment in accordance with s. 775.082.

(4) REVIEW OF JUDGMENT AND SENTENCE.—The judgment of conviction and sentence of death shall be subject to automatic review by the Supreme Court of Florida within 60 days after certification by the sentencing court of the entire record, unless the time is extended for an additional period not to exceed 30 days by the Supreme Court for good cause shown. Such review by the Supreme Court shall have priority over all other cases and shall be heard in accordance with rules promulgated by the Supreme Court.

(5) AGGRAVATING CIRCUMSTANCES.—Aggravating circumstances shall be limited to the following:

(a) The capital felony was committed by a person under sentence of imprisonment.

(b) The defendant was previously convicted of another capital felony or of a felony involving the use or threat of violence to the person.

(c) The defendant knowingly created a great risk of death to many persons.

(d) The capital felony was committed while the defendant was engaged, or was an accomplice, in the commission of, or an attempt to commit, or flight after committing or attempting to commit, any robbery, rape, arson, burglary, kidnapping, or aircraft piracy or the unlawful throwing, placing, or discharging of a destructive device or bomb.

(e) The capital felony was committed for the purpose of avoiding or preventing a lawful arrest or effecting an escape from custody.

(f) The capital felony was committed for pecuniary gain.

(g) The capital felony was committed to disrupt or hinder the lawful exercise of any governmental function or the enforcement of laws.

(h) The capital felony was especially heinous, atrocious, or cruel.

(i) The capital felony was a homicide and was committed in a cold, calculated, and premeditated manner without any pretense of moral or legal justification.

(6) MITIGATING CIRCUMSTANCES.—Mitigating circumstances shall be the following:

(a) The defendant has no significant history of prior criminal activity.

(b) The capital felony was committed while the defendant was under the influence of extreme mental or emotional disturbance.

(c) The victim was a participant in the defendant's conduct or consented to the act.

(d) The defendant was an accomplice in the capital felony committed by another person and his participation was relatively minor.

(e) The defendant acted under extreme duress or under the substantial domination of another person.

(f) The capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired.

(g) The age of the defendant at the time of the crime.

History.—s. 237a, ch. 19554, 1939; CGL 1940 Supp. 8663(340); s. 119, ch. 70-339; s. 1, ch. 72-72; s. 9, ch. 72-724; s. 1, ch. 74-379; s. 248, ch. 77-104; s. 1, ch. 77-174; s. 1, ch. 79-353.

Note.—Former s. 919.23.

No. 82-6154

IN THE

SUPREME COURT OF THE UNITED STATES

October, 1982

= =

NOLLIE LEE MARTIN,

Petitioner,

vs.

STATE OF FLORIDA,

Respondent.

= =

RESPONSE IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA

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Counsel for Respondent

No. 82-6154

IN THE

SUPREME COURT OF THE UNITED STATES

October, 1982

= =

NOLLIE LEE MARTIN,

Petitioner,

vs.

STATE OF FLORIDA,

Respondent.

= =

A F F I D A V I T

I. ROBERT L. BOGEN, Counsel for Respondent and a member of the Bar of this Court, depose and say:

1. That the enclosed Response in Opposition to Petition for Writ of Certiorari was mailed first-class postage prepaid at the Main Branch of the United States Post Office, West Palm Beach, Florida on March 4, 1983.

2. That the Response in Opposition to Petition for Writ of Certiorari was mailed within the permitted time and was therefore fimely filed under Rule 28, Section 2, of the Rules of this Court.

Robert L. Bogen

ROBERT L. BOGEN
Assistant Attorney General
111 Georgia Avenue, Suite 204
West Palm Beach, Florida 33401
Telephone (305) 837-5062

SWORN TO and SUBSCRIBED before me
this 4 day of March, 1983.

[signature]

NOTARY PUBLIC
Notary Public, State of Florida
My Commission Expires March 25, 1985

TABLE OF CONTENTS

TABLE OF AUTHORITIES

STATEMENT OF THE CASE

Respondent takes exception only with that part of Petitioner's Statement of the Case wherein he attempts to detail the matters presented at his suppression hearing. It is one-sided, argumentative, and misleading. To place the matter in its proper perspective, Respondent would add the following:

Respondent would note that Petitioner is no stranger to the criminal justice system. He was "street wise" to the system, having been previously convicted of various capital felonies, having previously spent time on death row in North Carolina, and currently being on parole (R 583, 609, 692).

Miranda rights were not a new thing for Petitioner that required his immediate digestion and unthinking decision making. In addition to receiving and waiving and writing his Miranda rights on July 4, 1977, and July 11, 1977, Petitioner was given and did waive in writing his Miranda rights on June 26, 1977 (the night of the homicide) (R 583-585, 603-606, 626, 637, 795). Petitioner had had a great deal of experience with the system to the extent that it could not be otherwise concluded but that he well knew his rights under Miranda, and knew how to exercise those rights. He never made any request for an attorney, nor did he ever invoke his right to remain silent (R 606, 798).

Petitioner claims that Detectives Glover and Anderson engaged in a "good guy - bad guy routine." It is true that

Detective Anderson initially came on strong with Petitioner (R 650, 651, 693-694). However, this lasted for only a total of fifteen to twenty minutes (R 693-694) of the four-hour interview. In fact, Detective Anderson was outside the room for most of the interview (R 694). Upon his reentry, Detective Anderson apologized to Petitioner, saying that he did not mean the things that he said (R 695). Beyond this short episode, absolutely no one at no time was anything less than totally courteous with Petitioner. The one aforementioned exception was neutralized by Detective Anderson's withdrawal from the room during most of the interview and his full and complete apology when he came back in.

Petitioner next states that Detective Anderson totally misled Petitioner regarding the evidence that was available against Petitioner. This is simply not the case. While Detective Anderson did tell Petitioner that Petitioner's co-accomplice had confessed, Detective Anderson did not tell Petitioner that this confession was to the instant charges (as opposed to another nearly contemporaneous criminal incident which, parenthetically, was the basis of Petitioner's arrest). In fact, Petitioner's co-accomplice did indeed make a full confession prior to Petitioner's confession, and various parts of the co-accomplice's confession (which had been tape recorded) were played for Petitioner (R 786-787).

Further, while Petitioner was told that there were three good witnesses who saw him at the Cumberland Farms store,

there was nothing false about this. In fact, all three witnesses testified at Petitioner's trial, accurately describing him, with one positively identifying him (R 3043-3089).

Finally, while Petitioner was told that an inaccurate BOLO was issued to keep him and his co-accomplice from leaving town, this was not shown to have been a falsehood. It is true that Petitioner was shown a picture of the victim's body, and it is further true that when Petitoner himself brought his uncle into the conversation, Detective Glover asked him how he thought his uncle may feel about his arrest (R 610).

It is true that the subject of religion and personal salvation was discussed with Petitioner, but Petitioner raised the subject (R 610). Further, it is true that there were adjurations for Petitioner to tell the truth. While Petitioner was told that the truth could help rather than hurt him, Petitioner was clearly informed that this meant there was sufficient evidence to convict him without a confession (which was true), and that telling the truth at this point could possibly be looked upon by the sentencing jury as a mitigating factor (R 656, 783-784). At no time was Petitioner given any assurances or promises, on many occasions being told to the contrary (R 784-785). Further, Petitioner was concerned about his personal salvation (R 780-782). To this, Assistant State Attorney Scarola, during the interview, suggested that a confession might be beneficial to that goal (R 780-782).

Petitioner was concerned about his mental state, and

felt that he needed psychiatric help (R 615). He was told that the judge would be made aware of his request for a psychiatrist. However, this promise to relate to the judge Petitioner's request for a psychiatrist did not relate to whether or not Petitioner confessed. It was collateral to the confession (R 658, 796). Petitioner makes a factual allegation that Assistant State Attorney Scarola came in and offered him legal advice. This is somewhat inaccurate. In fact, it was Petitioner who requested to speak with Assistant State Attorney Scarola (R 616). Scarola did come in and identify himself as a member of the prosecution team. Scarola explained his role in the prosecution (R 617, 776). Essentially, Scarola explained the position Petitioner was in in the context of Florida's bifurcated (guilt/innocence phase and sentencing phase) trial system. It was never indicated to Petitioner that should he not confess he would get the electric chair, but if he confessed he would not get the electric chair. No one suggested to Petitioner that they had the power to effect leniency on his behalf. The instant confession was not coerced out of Petitioner's mouth by raising the spector of the death penalty; it was Petitioner's free and voluntary choice arising from apprehension due to the situation in which he found himself that was the foundation of his decision to confess.

It is true that, at times during the July 4, 1977, interview, Petitioner became emotional, he cried, he trembled, and he seemed depressed. The question is, was his mental state

sufficient such that he could understandably waive his Miranda rights and give a voluntary confession. The trial judge observed the demeanor of the witnesses and the character of the testimony. The trial judge stated in his order that it had been very helpful to the court, in addition to the live testimony, to have the question of the voluntariness of the statement illustrated by an actual voice recording of what really occurred at the instant of the making of the statement (R 4757). The trial court noted that the context of the actual statement reflected a reasoned and logical discussion (R 4758). He further noted that the statement reflected a confident recitation of facts (R 4759).

Petitioner was apparently a man who was deeply moved by religion for, it was only at that point in the discussion that Petitioner started becoming emotional, wringing his hands, and crying at times, etc. (R 612, 648). Petitioner was described by Scarola as being under emotional strain and having emotional difficulty. However, Scarola perceived this to be a recognition by Petitioner of the seriousness of the situation with which Petitioner was confronted (R 798). Scarola stated that Petitioner acted very normal for one in Petitioner's current legal circumstances, and that Petitioner responded appropriately, recognizing the seriousness of the situation (R 3487-3488). Petitioner never appeared to lose contact with reality (R 3489-3490). Scarola perccived Petitioner as being emotionally disturbed in regard to how Petitioner felt about the

situation he was in; not emotionally disturbed in the mental sense (R 3529-3530). Detective Glover also testified that Petitioner's answers were always responsive (R 3396).

While it is true Petitioner spoke during the interview of prior periods during his life when there were uncontrollable forces, headaches, and dizziness (R 661, 671), these symptoms never manifested themselves in front of the officers.

While Dr. Vaughn testified that Petitioner was insane when he gave the statement, this testimony was refuted by the lay testimony of the various officers as well as by the manner in which Petitioner spoke on the tapes.

Petitioner also alleges that he was suffering from alcohol withdrawal during his July 4, 1977, statement. However, as previously noted, Petitioner was well-aware of his rights, for he was no novice to the criminal system. At any time, he could have stated his desire for a drink. His co-accomplice testified at trial that on the day of Petitioner's arrest, Petitioner had drunk two quarts of beer (R 3311). Notably, Dr. Vaughn testified at the motion to suppress hearing that had Petitioner been drinking within twenty-four hours of his arrest, his opinion that the Petitioner was suffering from alcohol withdrawal at the time of his confession would have changed significantly! (R 1133).

Petitioner had only to mention his physical maladies to the officers and they would have been rectified. However, he mentioned nothing. Indeed, his testimony at the motion to

suppress hearing exhibited a calculatingly selective memory. He remembered everything of a coercive nature, but he remembered nothing regarding waiving his rights or giving a confession.

Petitioner gave an extensive confession on tape on July 4, 1977. His voice did not reflect one who was craving for a drink, and one who was confessing solely for a drink. Petitioner intentionally waived his right and gave a confession.

With reference to the statement of July 11, 1977, Petitioner alleges that he had been formally charged in a non-adversary probable cause hearing, prior to which counsel had been appointed. Petitioner thus concludes that his sixth and fourteenth amendment right to the assistance of counsel was implicated in connection with this confession. However, Petitioner was not formally charged at such a hearing. The only thing that emanated from this hearing was that there was probable cause to continue holding Petitioner. Petitioner was not formally charged until an indictment was filed against him on August 4, 1977.

Regardless, with reference to the July 11, 1977, Petitioner in writing asked to speak to his parole officer and to Agent Glover. Petitioner himself initiated this contact in writing (R 757). Captain Donally told the Petitioner that his attorney did not want Petitioner speaking to anyone without his attorney's permission (R 757-758). Nonetheless, Petitioner signed a notation to the effect that he had received this warning, and told Captain Donally that he still wanted to talk to his parole

officer and Agent Glover despite his attorney's prohibition (R 762, 764). Captain Donally got Agent Glover on the telephone and heard Petitioner tell Agent Glover that Petitioner wanted to see him (R 765). Agent Glover came down and told Petitioner that Petitioner did not have to say anything, that Petitioner had counsel, and that Petitioner's counsel did not want Petitioner to say anything (R 637). Nonetheless, Petitioner again waived his Miranda rights. On July 11, 1977, when Petitioner requested to speak to his parole officer and to Agent Glover, and his parole officer responded to the request by coming to see him, Petitioner attacked her. Petitioner was therefore, obviously, subdued. As a result, Petitioner suffered a minor cut over his eye which required a couple of stitches. Petitioner characterizes this incident as a violent attack upon him. Indeed! Petitioner made no request for medical attention at this time. He was told of his attorney's advice to him. He wanted to make a statement, and he did so, waiving his Miranda rights explicitly.

Once it was demonstrated, at Petitioner's trial, that he committed the heinous crimes with which he was charged, the issue boiled down to the question of Petitioner's sanity. Seven doctors examined Petitioner on numerous occasions (R 4591-4592). Petitioner himself hired Dr. Vaughn and Dr. Levin, even prior to any court appointment (R 4592). Of all the doctors hired to examine Petitioner (at least two of which were hired by Petitioner at court expense), only one was able to come to the

conclusion that Petitioner was insane at the time of the crime. That was Dr. Vaughn who testified on Petitioner's behalf. All the other testifying doctors were of the opinion that Petitioner was feigning insanity (R 3756-3759, 3764, 3842, 3914, 3920).

It is to be noted that no doctor was hired on behalf of the prosecution; with the exception of those that were hired by Petitioner, all the other doctors were court-appointed. The prosecution's case-in-chief demonstrated that Petitioner committed the crimes he was charged with. Petitioner's case-in-chief attempted to demonstrate that Petitioner was insane at the time. The prosecution's rebuttal evidence contended that Petitioner was not in fact insane, but was feigning insanity. Now, on surrebuttal, Petitioner sought the court appointment of an eighth expert to impeach the conclusions (by attacking the way he performed the tests) of only one of the doctors which the prosecution presented on rebuttal.

REASONS FOR DENYING THE WRIT

POINT I

PETITIONER'S CONFESSION WAS VOLUNTARY, DESPITE HIS CONTENTIONS THAT HE WAS INSANE.

Petitioner contends that he was, in all probability, insane at the time of his confessions. The trial judge found otherwise. The jury found otherwise. The Florida Supreme Court found otherwise. As a result of these findings, which are presumptively correct under Sumner v. Mata, ___U.S. ___, 102 S.Ct. ___, 71 L.Ed.2d 480 (1982), Petitioner recognizes that Blackburn v. Alabama, 261 U.S. 199 (1960) cannot control his case. The evidence in the case sub judice most certainly did not "indisputedly establish" insanity.

Nonetheless, Petitioner urges this Court to accept jurisdiction over this case to establish a standard for evaluating the constitutionality of a confession which may have been the product of insanity. It would seem axiomatic that "voluntariness" is the key to whether a confession is voluntary, and the degree to which a person might be insane is but a factor which goes into the ultimate finding of voluntariness. Blackburn v. Alabama, supra, already establishes the relationship between insanity and voluntariness of a confession.

Petitioner keeps stating that his evidence at the motion to suppress hearing was uncontradicted. In fact, as pointed out in Respondent's Statement of the Case, there was quite a bit of contradiction. The witnesses were not in agreement,

and differing opinions came from the witness stand. It is to be noted that the only witnesses who testified favorably to Petitioner with reference to this issue were not present during the confessions.

In essence, Petitioner asks this Court to believe Dr. Vaughn's testimony (that Petitioner was insane despite his ability to act and sound as if he were absolutely in control of all of his faculties) rather than the testimony of all the other witnesses who testified to the contrary.

Furthermore, it is to be noted that there was other, direct evidence of Petitioner's guilt. Petitioner was identified by one witness who observed the kidnapping (R 3056-3057). Petitioner's co-accomplice gave a chilling account of the whole affair (R 3215-3286). The circumstantial evidence additionally pointed to Petitioner, as well as collaborated the co-accomplice's testimony.

There is no issue here which is of great public importance requiring resolution by this Court in order to provide guidance to the judiciary.

POINT II

THE STATE TRIAL COURT'S REFUSAL TO APPOINT AN EIGHTH PSYCHIATRIST TO EXAMINE PETITIONER WAS NOT ERROR.

There is no question but that the constitution can tolerate no discrimination between indigent defendants and defendants who possess the means to protect their rights. Such is not at issue here. Petitioner admits that he received the benefit of defense experts. He was examined by seven different psychiatrists and psychologists, many of whom were hired by the defense attorney at court expense. But Petitioner wanted one more. Under the facts of this case, it cannot be said that Petitioner was denied the equal protection of the laws. Petitioner wanted this last expert (for surrebuttal purposes) to challenge the conclusions of only one of the other experts who testified at trial, Dr. Scherer. However, if any of the other experts felt that Dr. Scherer's conclusions were unsupportable, Petitioner could have called them. The nature of psychiatric testimony makes such testimony a swearing contest. Such testimony must end somewhere. Just because Petitioner was able to find a psychologist who could impeach the conclusions of only one of the many doctors who testified against Petitioner does not make the trial court's failure to authorize Petitioner to obtain the services of that doctor a denial of equal protection under the laws. This must be the case in view of the many doctors who examined Petitioner, including two of Petitioner's own choosing.

POINT III

THE FLORIDA SUPREME COURT CONSIDERED EACH AND EVERY POINT RAISED BY PETITIONER ON DIRECT APPEAL.

Petitioner complains of the writing style of the Florida Supreme Court in the instant case. In his opinion, they simply did not write enough. However, the Florida Supreme Court did go through the facts of the case and the aggravating factors that were found by the trial judge. The aggravating factors were indisputably supported by the facts of this case it was self evident upon the face of the opinion of the Florida Supreme Court.

Petitioner merely faults the Florida Supreme Court for not discussing at length various legal issues which he raised. It is nonetheless evident, however, that the application of the facts of this case to the aggravating factors that were found by the trial judge was dealt with in the opinion. It cannot be said that the Florida Supreme Court's opinion renders the death penalty in this case nothing more than arbitrary.

Finally, in an apparent last-ditch effort to have this Court accept certiorari jurisdiction over this matter, Petitioner claims that this case presents precisely the same issue currently before the Court in Barclay v. Florida, No. 81-6908. It is self-evident that this is not the case. The Florida Supreme Court struck no aggravating factors. Anyone could conclude that the aggravating factors found by the trial judge in the instant case were supported beyond a reasonable doubt by the evidence.

CONCLUSION

Based upon the foregoing argument, supported by the circumstances and authorities cited therein, Respondent would respectfully request that this Honorable Court decline to accept certiorari jurisdiction over the instant matter.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing Response in Opposition to Petition for Writ of Certiorari to the Supreme Court of Florida has been furnished, by courier/mail, to RICHARD H. BURR, III, ESQUIRE, Assistant Public Defender, 224 Datura Street - 13th Floor, West Palm Beach, Florida 33401, this 4th day of March, 1983.

Of Counsel